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No. 04-1527

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SUPREME COURT

IN THE

Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner,

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

AMICUS CURIAE BRIEF OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95 (2004), address whether the conveying of a river's water through an existing dam constitutes a "discharge," requiring a state water quality certification under Section 401 of the Clean Water Act.

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AMICUS CURIAE BRIEF OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA IN SUPPORT OF RESPONDENT

With the written consent of the parties given and filed with the Clerk of the Court, the Miccosukee Tribe of Indians of Florida ("Tribe") respectfully submits this brief as *amicus curiae*.[1]

1. Counsel for *amicus curiae* have authored this brief in whole and no other person or entity other than amicus, its members or counsel have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Miccosukee Tribe of Indians of Florida is a federally-recognized Indian Tribe, whose members live in the Florida Everglades, an historically distinct and internationally significant wetlands ecosystem. The culture, health and well being of the Tribe is dependent on preserving the chemical and physical water quality of the Florida Everglades. Accordingly, the Tribe has consistently participated in efforts to protect the Everglades from pollution that threatens to alter and degrade the water quality of these wetlands.

The Tribe was the Plaintiff/Respondent in *South Florida Water Management District v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95 (2004). The Petitioner in this case has made arguments regarding the holding in *Miccosukee* that the Tribe believes are incorrect.

Miccosukee resolved the question presented: whether the NPDES program covers a point source only when pollutants originate from the point source and not when pollutants originating elsewhere merely pass through a point source. This Court held that the definition of a point source makes it plain that the point source need only convey the pollutant to navigable waters.

The *Miccosukee* Court also recognized that both of the lower federal courts had made a "predicate determination" on a motion for summary judgment that the discharging S-9 pump station at issue conveyed waters between two distinct water bodies resulting in the addition of pollutants to the receiving waters. However, the Court remanded the *Miccosukee* case to the district court for the development of a more complete record on allegedly disputed facts that would

establish whether the C-11 drainage canal from which polluted waters were withdrawn was meaningfully distinct from the WCA-3 Everglades wetlands into which the polluted waters were discharged. The district court in *Miccosukee* has not yet resolved the factual issue to be decided on remand.

The Tribe has an interest in this case because Petitioner has misconstrued the *Miccosukee* decision and seeks to use the decision, which involved a Section 402 permit and a very narrow holding, as precedent for determining whether a Section 401 certification is required under the Clean Water Act ("CWA") for discharges of water through a river's hydroelectric dams. The Petitioner also attempts to use a litigation memorandum drafted by counsel for the Environmental Protection Agency ("EPA") for a case in which the Tribe is Plaintiff-Intervenor and which is still being litigated below. The Tribe has an interest in addressing this issue as well.

SUMMARY OF ARGUMENT

This case presents the question whether dammed river waters may lawfully be discharged into downstream waters without obtaining a Section 401 state water quality certification under the CWA. The Petitioner, and *amici* on behalf of Petitioner, misconstrue *Miccosukee* and argue that it compels the conclusion that a Section 401 state water quality certification for a discharge is not required. However, as shown below, *Miccosukee's* very narrow holding does not support this conclusion. Moreover, the Petitioner and *amici*'s reliance on an EPA litigation memorandum, issued on the date of the summary judgment motions deadline in district court in an unrelated case in order to obtain a litigation advantage, should be rejected; that memorandum is not entitled to deference.

ARGUMENT

I. *MICCOSUKEE*'S NARROW HOLDING DOES NOT SUPPORT PETITIONER'S CLAIM THAT A SECTION 401 CERTIFICATION IS NOT REQUIRED IN THIS CASE

A. The Narrow Holding Of *Miccosukee*

In *Miccosukee*, this Court found "untenable" the petitioner's argument that it did not need a Section 402 permit because its S-9 pump station was not itself adding anything to the polluted water being discharged into waters of the United States. The Court rejected the petitioner's proposed reading of the definition of "discharge of a pollutant" contained in 33 U.S.C. § 1362(12) because "[t]hat definition includes within its reach point sources that do not themselves generate pollutants." *Miccosukee*, 541 U.S. at 105. This is the only question on which the *Miccosukee* Court granted certiorari and the only substantive issue decided by the Court. Thus, the *Miccosukee* case holds that under Section 402 of the CWA, the pollutants being added to the receiving waters need not be generated by the point source itself. *Id.*

The *Miccosukee* opinion also noted that both the district court and the Eleventh Circuit rested their holdings on the "predicate determination" that the C-11 canal and the WCA-3 wetlands were distinct waters of the United States. *Id.* at 99. This Court explained that it would not address the adequacy of the legal test used by the trial court to determine whether the C-11 canal and the WCA-3 wetlands were distinct waters of the United States: "[i]nstead, we hold *only* that the District Court applied its test prematurely." *Id.* at 111 (emphasis added). It is thus clear that the *Miccosukee* opinion decided the question

presented and does no more than reverse what it believed was a premature summary judgment and remand for a fuller development of the factual record.

Petitioner incorrectly argues that "*Miccosukee* thus holds that merely taking control over water in a man-made facility to cause it to travel from one point to another is not an addition of anything to the waters if the water at the entrance and the exit of the facility are not meaningfully distinct water bodies." Pet. Brief at 21. *Amici* incorrectly argue that this Court in *Miccosukee* "held that the mere pumping of water from one part of a water body into another part of the same water body does not constitute an 'addition' of a pollutant; therefore, no discharge occurs for purposes of Section 402 of the CWA." Br. of *Amicus Curiae* Salt River Project Agric. Improvement & Power Dist. at 9. Other *amici* incorrectly argue:

> A fundamental flaw in the SJC's decision is its failure to address this Court's holding in *Miccosukee*. In *Miccosukee*, the Court considered what constitutes an 'addition' in the context of Section 402 of the CWA, where water was pumped from a canal to a water conservation area sixty feet away. 541 U.S. at 100, 104-05. This Court confirmed that a 'discharge of a pollutant' occurs only when the water body receiving the water is 'meaningfully distinct' from the water body that was the source of the water. *Id.* at 112.

Br. of *Amicus Curiae* Nat'l Ass'n of Home Builders at 8-9. However, *Miccosukee* does not hold as Petitioner and *amici* state.

Perhaps as a result of a mistaken belief that the Tribe had conceded that, if the WCA-3 wetlands and the C-11 canal were not meaningfully distinct water bodies the pump station would not need a permit,[2] the Court in *Miccosukee* noted:

> After reviewing the full record, it is possible that the district court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit.

Id. at 112. However, this statement in *Miccosukee* is *dicta* because it is simply an expression of judicial opinion about the way the law would be if applied to facts not before the court. *Marange v. Fontenot*, 879 F. Supp. 679, 686 n.5 (E.D. Tex. 1995); *see also Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 125 S. Ct. 694, 706 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."). *Miccosukee* held only that summary judgment was premature and that the point source need not originate the pollutant in order to be covered by the permit requirements of § 402 of the CWA.

B. The Tribe Has Always Taken The Position That Pumping Water From One Part Of A Water Body Into Another Can Constitute An Addition Of Pollutants

This Court in *Miccosukee* stated that "the Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *Miccosukee*, 541 U.S. at 109. *Amici* argue here that "[i]n *Miccosukee*, the Court noted with approval the Miccosukee Tribe's concession

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2. *See* argument Section I.B., *infra*.

'that if [the C-11 canal] and [the WCA-3 wetlands] are *simply two parts of the same water body*, pumping from one into the other cannot constitute an 'addition' of pollutants.'" Br. of Amicus Curiae Augusta, Ga. at 7. In fact, this was not the Tribe's position in *Miccosukee* and it is not the Tribe's position here. Indeed, the Tribe sought rehearing on this point to clarify the record. *See* Tribe's Petition for Rehearing, attached as appendix herein.

Relying on *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the Tribe's counsel explained at oral argument in *Miccosukee* that whether the WCA-3 and the C-11 are considered to be one body of water (i.e., hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction - away from WCA-3. (Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

The conclusion that the Tribe conceded this point is incorrect. As the Tribe stated in its Petition for Rehearing to this Court: "[a]ccordingly, the Tribe did not, and has never conceded that permits would not be required if it is determined that the C-11 and the WCA-3A are one, interconnected body of water." Petition for Rehearing at 3.

C. *Miccosukee* Does Not Support Petitioner's Argument Here

The lower courts in this case considered whether the Maine Board of Environmental Protection ("BEP") had jurisdiction to issue a water quality certification under Section 401 of the CWA for the renewal of Federal Energy Regulatory Commission ("FERC") operating licenses for the Petitioner as operator of six hydro-electric dam structures in Maine. The Section 401 state water quality certifications are required as a pre-condition to issuance or renewal of federal licenses or permits for any structures that "may result in any discharge into navigable waters." 33 U.S.C. § 1341(a)(1). The BEP issued the Section 401 water quality certification with certain conditions and a re-opener clause, permitting future review of the water quality certification under certain conditions.

On this appeal, Petitioner for the first time invokes the *Miccosukee* case and suggests it holds that Section 401 certification is not required if water at the entrance and the exit of a dam are not meaningfully distinct. However, as noted above, the *Miccosukee* decision contained no such holding. Indeed, *Miccosukee* does not make any reference to the certification requirements of Section 401. Rather, the *Miccosukee* decision addressed whether Section 402 of the CWA requires a permit for the operation of a structure pumping pollutants, against the forces of gravity, into the waters of the Everglades.

Section 402(12) of the CWA defines the term "discharge of pollutants" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Thus, Section 402 requires NPDES permits for discharges, such as the ones addressed in the *Miccosukee* decision, that actually add pollutants to navigable waters of the United States. Section 401(a)(1), in contrast, requires applicants for federal permits or licenses to obtain water quality certifications for structures that "*may* result in *any* discharge into navigable waters," and does not speak of "pollutants." 33 U.S.C. § 1341(a)(1)(emphasis added). Accordingly, although structures discharging or "adding" pollutants would likely be included in operations that "may result in any discharge into navigable waters," there could be many additional operations that "may result in a discharge into navigable waters," without actually adding any pollutants from any point source. Accordingly, whether a structure in fact adds pollutants, within the Section 402 definition of the term, would not determine whether the structure requires the threshold water quality certification under Section 401 of the CWA. It is sufficient that the structure "may result in any discharge." The Supreme Judicial Court of Maine correctly relied upon this distinction in *S.D. Warren v. Board of Environmental Protection*, 868 A.2d 210 (Me. 2005).

II. THE "AGENCY INTERPRETATION" RELIED UPON BY PETITIONER AND *AMICI* IS NOT ENTITLED TO DEFERENCE

Petitioner's brief refers to an August 5, 2005 litigation memorandum authored by General Counsel for the EPA, although no argument is provided regarding how this Court should treat this memorandum. *Amici* in support of Petitioner argue that since the decision in *Miccosukee*, EPA has

"formally" articulated its interpretation of Section 402's permitting requirement with respect to water diversions and conveyances and that this formal interpretation confirmed EPA's long-standing practice and is consistent with earlier circuit court decisions. Br. of *Amici Curiae* Western Urban Water Coalition at 5; *see also* Br. of *Amicus Curiae* Nat'l Ass'n of Home Builders at 8 (referencing the "Agency interpretation of August 5, 2005). As shown below, this document is not entitled to deference.

The litigation memorandum of August 5th referred to by Petitioner and *amici* was created for the case styled *Friends of the Everglades v. SFWMD*, case no. 02-80309-CIV-Altonaga/Turnoff, in which the Tribe is a Plaintiff-Intervenor. In that case, the Government attempted to obtain an advantage by issuing a last minute "opinion" that simply restated its litigation position. The Government relied on this memorandum in its motion for summary judgment arguing that the memorandum was an agency interpretation entitled to deference. The district court correctly denied the Government's summary judgment motion. D.E. 527, case no. 02-80309.

The EPA litigation memorandum purports to advocate a "holistic" approach to the CWA, while actually arguing that the separate, interrelated regulatory measures of the CWA be ignored by means of unauthorized, ad hoc "exemptions" to its express permitting requirements. The litigation memorandum restated the Government's arguments in case no. 02-80309 relying on non-point source regulation, Section 101(g), and Section 304 as exemptions to the Section 402 permit requirements of the CWA and also provided what EPA believed was a modified version of the "unitary waters theory" argued by the United States in *Miccosukee*.

The litigation memorandum is not entitled to deference for several reasons. First, no deference is appropriate when the statutory language is clear. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). The CWA requires a Section 402 permit for "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1342 and 1362(12). Thus, the provisions of the CWA are quite clear: if there is a discharge of pollutants from a point source, a permit is required. That is the end of the inquiry. No deference to the agency is necessary or appropriate. *Id.*

The agency interpretation disregards the clear statutory language of the CWA and adopts wholesale the defendants' litigation position that point source discharges of pollutants do not need Section 402 permits under the CWA. No deference at all should be accorded to the agency's legal memorandum, because it disregards the provisions of the CWA that require Section 402 permits for all discharges from point sources into navigable waters. To reach the result urged in the agency's litigation memorandum, the plain language of the CWA would have to be rewritten to prohibit "any addition of any pollutant to navigable waters from any point source *unless the point source conveys or connects other navigable waters.*" Because the statutory language plainly and unambiguously requires an NPDES permit, and the agency's litigation memorandum is contrary to Congress' unambiguously expressed intent, that memorandum is not entitled to deference.[3]

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3. Petitioner's argument that the EPA litigation memorandum directs a conclusion that Section 401 certification is not required in this case also ignores the fact that the litigation memorandum was drafted for a case that involved Section 402 NPDES permit requirements, not Section 401 certification.

Moreover, deference under *Chevron* is only appropriate in reviewing administrative action that is the result of notice and comment rule-making, or formal adjudication, or where there are persuasive indications that Congress intended for the agency action to have the force of law. *See United States v. Mead Corp.*, 533 U.S. 218, 230-32 (2001). The litigation memorandum was not the result of notice and comment rule-making, nor of any formal adjudication. The agency litigation memorandum is not a regulation formally prescribed by the EPA pursuant to its delegated authority. Instead, it is a legal memorandum prepared by EPA General Counsel that simply restates the United States' litigation position in a case that is still being litigated in the district court. Thus, there can be no argument that the litigation memorandum is entitled to *Chevron* deference.

If the agency action at issue is not a formal regulation or adjudication, the agency action may be "'entitled to respect' under [this Court's] decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1238 (11th Cir. 2002) ("Agency interpretations expressed in opinion letters must be viewed through the standard enunciated in *Skidmore*."). Under the *Skidmore* doctrine, the agency interpretation's power to persuade should be considered in light "of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Mead Corp.*, 533 U.S. at 235. As shown below, the EPA litigation memorandum lacks thoroughness and logic, and is inconsistent with prior agency practice and persuasive legal authority.

The litigation memorandum is unpersuasive because it relies on incorrect theories to circumvent the plain requirements of

the CWA. The Court in *Miccosukee* discussed the unitary waters theory advanced by the United States, that is, that the "waters of the United States" are one and that once a pollutant is added to any part of the waters of the United States, the resulting polluted water can then be added to the remaining waters of the United States without further regulation under the CWA. The *Miccosukee* Court noted the Government's theory would lead to the conclusion that Section 402 permits would not be required even if "one water body were polluted and the other pristine and the two would not otherwise mix." *Id.* at 105-06 (citing *Catskill Mountains Chapter v. New York*, 273 F.3d 481, 492 (2d Cir. 2001); *Dubois v. United States Dept. of Agriculture*, 102 F.3d 1273 (1st Cir. 1996)).

The Court also characterized the Government's unitary waters argument as contending that Congress intended that such pollution be addressed through local non-point pollution programs. The Court noted, however, that "§ 1314(f)(2)(F) does not explicitly exempt non-point pollution sources from the NPDES program if they *also* fall within the 'point source' definition. And several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 106-07. Indeed, any attempt to use non-point source regulation as a substitute for permit requirements is contrary to the CWA and has been rejected by the few circuit courts of appeal that have addressed the issue. *See United States v. Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979) (holding that Section 304(f) lists activities that "may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation"); *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (same); *Sierra Club v. Abston Constr. Co. Inc.*, 620 F.2d 41, 44 (5th Cir. 1980) (same). Thus, this Court questioned the unitary waters theory although leaving it open to be raised for further development on remand.

Moreover, there is no exemption in the CWA for state water allocation activities. In order to meet the objective of "restor[ing] and maintain[ing] [the] chemical, physical and biological integrity of [the] Nation's waters," 33 U.S.C. § 1251, the CWA makes unlawful without an NPDES permit "the discharge of any pollutant by *any person*." 33 U.S.C. §§ 1311 & 1342 (emphasis added). The term "person" is defined to include states and any political subdivision of a state. 33 U.S.C. § 1362. Citizen suits are authorized to enforce the permit obligation against "any [] governmental instrumentality or agency . . . permitted by the eleventh amendment." 13 U.S.C. § 1365. Thus, the plain language of the CWA subjects state and local governments to the permitting requirements. As this Court has explained, "[*e*]*very* point source discharge is prohibited unless covered by a permit . . ." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981).

There is no express exemption in the CWA for state water allocation activities. Instead, the Act's "Congressional declaration of goals and policy" section states, among other things, that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Section 101(g) does not say that if a state is involved in water allocation activities it is not required to obtain a permit for discharges of pollutants into navigable waters. Moreover, CWA regulation of water *quality* is perfectly consistent with State authority to allocate water *quantities*. For these reasons, it is well-settled that Section 101(g) does not create an exemption from the requirements of the CWA but rather "is only a general policy statement" which cannot nullify the clearly expressed will of Congress requiring compliance with the permitting requirements of the Act. *Riverside Irrigation District v. Andrews*, 758 F.2d 508, 514

(10th Cir. 1985); *see also James City County, Virginia v. EPA*, 12 F.3d 1330, 1336 (4th Cir. 1993).

In short, the Government's arguments, which attempt to create exemptions by using the unitary waters theory, "non-point source" arguments, as well as Section 101(g), incorrectly interpret the CWA and are not persuasive.

Additionally, the agency's position in the litigation memorandum is not consistent with prior positions and is not long-standing. The agency acknowledges the existence of a 1975 agency opinion that takes the opposite view. The litigation memorandum attempts to distinguish the 1975 opinion and then also rejects it. Certainly, however, it cannot be argued that the new agency position is long-standing. It represents a drastic change in position, with no persuasive justification such as a change in statutory language or even a regulation.

Finally, because the trial court was not given the opportunity to consider the litigation memorandum, it is unclear whether the scope of the "agency interpretation" would apply to the facts in this case, even if the opinion were entitled to any deference, which it is not.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX A

No. 02-626

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PETITION FOR REHEARING

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Appendix

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STATEMENT

Pursuant to Sup. Ct. R. 44, the Tribe requests rehearing to correct statements in the Opinion which inaccurately state the Tribe's position in this appeal, and which, if left uncorrected, could cause confusion on remand.[1] The corrections are necessary not only to reflect the clear record before the Court regarding the Tribe's long standing positions — before the district court, before the circuit court and in its brief and argument to this Court — but also because they clarify the hydrological relation between these two distinct surface water bodies. Rehearing is proper because the portion of the Opinion that was remanded contains misconceptions of fact.

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1. The Tribe fully recognizes that rehearing petitions are granted only rarely and that they are not a vehicle for rearguing a case the Court has taken great care in deciding. *See* Sup. Ct. R. 44. Nevertheless, the Tribe understands that the Court will make changes "to correct certain inaccuracies or omissions brought to light by a petition for rehearing. . . ." Robert L. Stern, *et al.*, Supreme Court Practice 729 (8th ed. 2002) (collecting cases). The Tribe respectfully submits that the Court should grant rehearing in this case for the limited purpose of correcting two material inaccuracies in the Opinion regarding the Tribe's positions in this appeal.

Appendix

1. The Opinion Should Be Corrected To Reflect That The Tribe Does Argue That A Permit Would Be Required Even If The WCA-3 And The C-11 Are Determined To Be Two Parts Of The Same Water Body.

The Opinion states: "The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *South Florida Water Management District ("SFWMD") v. Miccosukee Tribe of Indians, et al.*, 124 S. Ct. 1537, 1545 (2004). This is incorrect.

At oral argument, the Tribe's counsel argued that permits would be required even if the WCA-3 and the C-11 were found to be the same body of water:

> QUESTION: . . . do you think that if it — if — if it is established that — that this is the same water body, these pumps would be ok without permitting.
>
> MR. LEHTINEN: No, your honor, because . . .
>
> QUESTION: I thought so . . .

(Tr. at 37).

* * *

> QUESTION: But you say this doesn't matter anyway. You wouldn't care if it was the same

> water body. That isn't — that isn't what you are arguing.
>
> MR. LEHTINEN: We do argue that [if] it is the same water body and you pump it substantially upstream. You would also need a permit.
>
> QUESTION: Right, right.

(Tr. at 43-44).

Relying on *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1992), the Tribe's counsel explained that whether the WCA-3 and the C-11 are considered to be one body of water (i.e., hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction — away from WCA-3. (Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly

> argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

In its brief, the Tribe consistently argued that permits were required because "the S-9 pump station reverses the natural flow, backpumps 'against a gradient' or 'against what would flow naturally the other direction, or another direction,' and disposes the polluted water to the west, where it would not have flowed otherwise." (Resp. Br. at 8); (*see also* Resp. Br. at 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). Accordingly, the Tribe did not, and has never, conceded that permits would not be required if it is determined that the C-11 and the WCA-3 are one, interconnected, body of water. The Court should correct the Opinion so that there is no confusion on remand.[2]

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2. The Court also states in *dicta* that:

> After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit.

SFWMD, 124 S. Ct. at 1547. To the extent this *dicta* was predicated on the Opinion's statement that the Tribe concedes that no permits would be required if the C-11 and WCA-3 are the same body of water, this language should be corrected because there was no such concession. Whether or not predicated on that assumption, the *dicta* should be corrected because it is confusing. Backpumping and discharging surface water containing pollutants from downstream

(Cont'd)

2. The Decision Should Be Corrected To Reflect That The Tribe Does Defend The Decisions Of The Lower Courts That The C-11 And The WCA-3 Are Distinct Because The Transfer Of Water From The C-11 Into The WCA-3 Would Not Occur But For The S-9 Pump.

The Opinion also states that the district court applied a test for determining whether the C-11 and the WCA-3 are distinct water bodies which "neither party defends; it determined that C-11 and WCA-3 are distinct 'because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.'" *SFWMD*, 124 S. Ct. at 1546. This statement is mistaken with respect to the Tribe's position.

The Tribe vigorously defends the district court's view that a permit is required because the transfer of surface water pollutants from the C-11 to the WCA-3 would not occur naturally. (Resp. Br. at 8, 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). The Tribe did not otherwise explicitly defend the district court's application of this test for distinguishing the two water bodies because the District simply did not challenge that test in its Petition to this Court. (*See* Pet. Br. at 46-49). Indeed, it would have been futile for the District to do so because the undisputed record evidence

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(Cont'd)

sources into pristine areas upstream would require a permit even if the stream is the same hydrologically because it would involve the discharge of pollutants. Although the Court recognized this difference by using the term "meaningfully distinct" water bodies and "cause in fact," the *dicta* does not expressly set forth the criteria for establishing the "same body of water" test.

is that, absent the operation of the S-9 pumps, water from the C-11 would not naturally enter the Everglades Water Conservation Area:

> Water in the C-11 canal could occasionally, under extreme hydrologic conditions, flow from east to west. However, it would *not naturally* enter the Everglades Protection Area without the operation of the S-9 pump station.

(J.A. at 193) (emphasis added). As the Eleventh Circuit explained, "[n]either party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow [west] into the WCA-3A." (Petition at 8a).[3]

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3. The Tribe clearly stated in its brief that the lower courts

> correctly found that Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote 'but for' cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an 'addition'.

(Tribe's Br. at 24); (*see also* Br. of Friends of the Everglades at 9).

Appendix

CONCLUSION

For the foregoing reasons, this Court should grant rehearing.

Respectfully submitted,

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